United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

Signed

75-4248

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ESTATE OF AMY ANN McGINNIS SPALDING,
Deceased, CHARLES F. SPALDING,
Executor,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

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P/S

ON APPEAL FROM THE DECISION OF THE

UNITED STATES TAX COURT

APPELLEE'S PETITION FOR REHEARING WITH

SUGGESTION OF REHEARING EN BANC

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To the Honorable United States Court of Appeals for the Second Circuit:

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, and Rule 40 of the Rules of this Court, the Commissioner of Internal Revenue, the appellee herein, respectfully petitions for a rehearing with a suggestion that it be heard en banc.

1. On June 18, 1976, this Court (Judges Moore, Feinberg and Wyzansky) ruled that since the courts of the State of California, where decedent was domiciled at the time of her

death, had not spoken on the validity of the decedent's marriage to Charles Spalding, this Court would not declare the marriage invalid. Thus, this Court ruled that Charles was Amy's "surviving spouse" for purposes of the estate tax, and that her estate was entitled to a marital deduction on those amounts passing to Charles under Section 2056 of the Internal Revenue Code of 1954.

On June 29, 1976, this Court (Judges Hays, Mulligan and Palmieri) in Estate of Goldwater v. Commissioner (No. 75-4277) ruled that because the courts of the State of New York, where the decedent was domiciled at the time of his death, had ruled that his divorce from his first wife, Gertrude, was invalid, his subsequent marriage to Lee was ineffective to make her the decedent's "surviving spouse." Thus, only amounts passing from the decedent's estate to Gertrude through compromise of Gertrude's filing of a right of election qualified for the marital deduction. */ The taxpayersin Estate of Goldwater have filed a petition for rehearing with suggestion of en banc review, alleging inter alia, that the decision in that case conflicts with the decision in Spalding.

Because the taxpayers in Estate of Goldwater v. Commissioner, supra, have filed a petition for rehearing with suggestion of en banc review we are filing this petition for rehearing with a suggestion of en banc review.

*/ On June 24, 1976, the Seventh Circuit decided Estate of Steffke v. Commissioner (No. 75-2161).

In Estate of Goldwater, this Court ruled that the law of the decedent's domicile was determinative as to the validity of the decedent's marital status -- (Slip Op. 4532-4533) --

> Here of course it is Leo's estate which is at issue; it was administered by the State of New York where he was domiciled and where a court of that state had held his divorce and "remarriage" to Lee to be invalid and of no force and effect. We consider that there is no alternative but to follow the law of New York and hold that Gertrude is his "surviving spouse" and that Lee does not qualify as such within the meaning of section 2056.

The court in Spalding, on the other hand, apparently did not feel obliged to determine whether the "marriage" allegedly entered into by Charles and Amy was valid under the laws of their domiciliary state.*/ Rather, it seems to have viewed all arguments concerning the invalidity of that "marriage" as expressing no more than the somewhat parochial view of a non-domiciliary state, New York. Thus, it characterized the New York Supreme Court order declaring the Nevada divorce decree invalid as a ruling that the Nevada Court was not "'a Court of competent jurisdiction' according to New York standards" (Slip Op. 4243) and questioned "whether California, the state of residence, the state of the marriage and the state of probate" might not have

*/ The state courts in California, the domiciliary state in Spalding, had never been called upon to determine whether Amy and Charles were validly married under California law. Charles was apparently a specifically named beneficiary under Amy's will and was also specifically named her executor. Accordingly, the property passing to him under her will passed to him as beneficiary, rather than as a spouse and his appointment as executor derived from Amy's nomination, rather than his marital status.

had the power to disregard the New York Supreme Court's ruling (Slip Op. 4245). We submit that there is no room to doubt that the Nevada divorce was not valid and that the California courts would have followed the decision of the New York Court in declaring it invalid.

It is clear that the Nevada divorce court was not a "Court of competent jurisdiction" to grant Charles a divorce here, no matter whether judged by New York or California standards. In the proceedings instituted by Elizabeth to have her marriage declared valid in the face of Charles' Nevada divorce, Charles personally appeared and deposed on oath that he had failed to satisfy the jurisdictional prerequisites to obtaining the Nevada divorce. That is, whereas Nevada Rev. Stat. §§ 10.020 and 125.020 required the plaintiff to establish that he had been a legal "resident" of the State of Nevada for a period of not less than six weeks preceding the institution of his action for divorce, Charles, in the New York proceedings, repudiated what he was required to prove in the Nevada proceedings and deposed that his residence was in the State of New York throughout the relevant period. (Ex. 6-F.) Under those circumstances, of course, the New York court had virtually no choice but to declare the Nevada divorce invalid in New York. And it is clear that had the question been initially raised in California, the California courts would have reached the same conclusion. Carmichael v. Carmichael, 216 CA 2d 674, 31 Cal. Rptr. 514 (C.A. 3, 1963). The "divorce" in Spalding, then, was exactly on a

par with the "divorce" in Estate of Goldwater -- concededly invalid.

The fact that the status of Charles' purported divorce was not raised in the California courts as an initial matter should not affect the conclusion that California would not recognize his Nevada "divorce." Indeed, the fact that the New York Supreme Court had ruled the divorce decree invalid on the ground that the Nevada court never acquired jurisdiction over Charles or over Charles' and Elizabeth's marriage would obviate the necessity for the California courts ever inquiring into the facts surrounding the granting of the Nevada divorce decree. Section 1 of Article IV of the Constitution requires that each state give "Full Faith and Credit" to the judicial proceedings of its sister status. Under that doctrine, the California courts would be obliged to give effect to the New York decree determining that Charles and Elizabeth were still married. See Williams v. North Carolina, 325 U.S. 226 (1945); 29 Cal. Jur. 2d, Judgments, § 300; 24 Am. Jur. 2d, Divorce and Separation, § 954; Restatement, Conflict of Law 2d §§ 92, 104. Cf. Carmichael v. Carmichael, supra; Delanoy v. Delanoy, 216 Cal. 27, 13 P. 2d 19 (1932); Crouch v. Crouch, 28 Cal. 2d 243, 169 P. 2d 897 (S.C., en banc, 1946); Colby v. Colby, 78 Nev. 150, 369 P. 2d 1019 (1962). And that constitutionally-dictated conclusion leads inevitably to the conclusion that Charles was not married to Amy under California law. As this Court stated in Estate of Goldwater, supra (Slip

Op. 4535):

> We have not yet reached the stage where a subsequent marriage destroys the marital rights of the first wife without an intervening valid dissolution of the marital status.

Had this Court, then, made full reference to the law of the decedent's domiciliary state, it would have concluded that Amy was not Charles' "spouse" under the law of that state. A reference to the full body of the domiciliary state's law, including that portion of the law mandated by the full faith and credit clause, would, moreover, avoid certain of the anomalies now possible. Under the decisions in Spalding and Estate of Goldwater, as now enunciated, if the decedent, Amy, and Elizabeth had died on the same day, Charles would be able to successfully assert that he was Amy's "surviving spouse" as to all amounts bequeathed him by her and also be able to assert that he was Elizabeth's "surviving spouse" as to the amount payable to him under New York law as the result of exercise of his right of election. In short, this Court's opinions might now have the effect of creating a polygamous marriage for estate tax purposes, contrary to the explicit assumption by the Congress that there could exist at one time only one individual capable of coming within the definition of the term "surviving spouse." S. Rep. No. 1013 (Part 2), pp. 6-7 (1948-1 Cum. Bull., p. 335). The rule we propose -- under which the marital status of a decedent and a purported spouse is determined in accord with the full law of the

domiciliary state, no matter whether that state's law has been expressed in a specific ruling as to the validity of the specific "marriage" in suit -- avoids this anomaly and more truly reflects the actual status of a deceased and his or her purported spouse.

Wherefore, we pray that this petition for rehearing and suggestion for rehearing en banc be favorably considered, and that the decision of the Tax Court in these proceedings should be affirmed.

Respectfully submitted,
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AUGUST, 1976.

CERTIFICATE OF COUNSEL

The undersigned counsel for the appellee hereby certifies that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

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CERTIFICATE OF SERVICE

It is hereby certified that service of this petition for rehearing with suggestion for rehearing en banc has been made on opposing counsel by mailing four copies thereof on this 30th day of ~~August~~ July, 1976, in an envelope, with postage prepaid, properly addressed to them as follows:

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